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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

CARNELL BATES and DARNELL BATES

Petitioners

vs

PAMELA K WITHROW, WARDEN,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WERE PETITIONERS, WHEN THEY FILED THEIR SECOND FEDERAL HABEAS CORPUS PETITION, REQUIRED TO SHOW CAUSE AND PREJUDICE FOR NOT HAVING RAISED THEIR NEW CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THEIR FIRST FEDERAL HABEAS CORPUS PETITION WHEN THE MICHIGAN COURT OF APPEALS, INSTEAD OF INVOKING THE STATE PROCEDURAL RULE REQUIRING THAT ALL APPELLATE ISSUES BE RAISED IN THE FIRST APPEAL AS OF RIGHT, GRANTED PETITIONERS LEAVE TO APPEAL AFTER THEIR APPEAL AS OF RIGHT WAS COMPLETED ADVERSELY TO THEM (AND AFTER THEIR FIRST FEDERAL HABEAS CORPUS PETITION HAD BEEN DENIED) AND TO PRESENT THIS SAME NEW FEDERAL CONSTITUTIONAL CLAIM TO THE MICHIGAN COURT OF APPEALS AND WHEN THE MICHIGAN COURT OF APPEALS ADDRESSED THIS NEW FEDERAL CONSTITUTIONAL CLAIM ON ITS MERITS AND ADJUDICATED THE CLAIM ADVERSELY TO PETITIONERS?

II

WERE FACTS WHICH FORMED THE BASIS OF PETITIONERS' CLAIM IN THEIR SECOND FEDERAL HABEAS PETITION THAT THEIR TRIAL ATTORNEY WAS INEFFECTIVE FOR FAILING TO COMMUNICATE TO THEM BEFORE TRIAL A PLEA BARGAIN OFFER MADE BY THE PROSECUTOR REASONABLY AVAILABLE TO THE 20 YEAR-OLD UNEDUCATED HABEAS PETITIONERS AT THE TIME THEY FILED THEIR FIRST PETITION FOR HABEAS CORPUS WHEN THEY DIDN'T REALIZE THE LEGAL SIGNIFICANCE OF THE FACTS WHICH WERE KNOWN TO THEM?

III

WHEN PETITIONERS SHOWED IN THEIR SECOND PETITION FOR HABEAS CORPUS THAT PETITIONERS' TRIAL COUNSEL FAILED TO COMMUNICATE TO PETITIONERS BEFORE TRIAL A PLEA BARGAIN OFFER MADE BY THE PROSECUTOR AND FAILED TO DISCLOSE TO PETITIONERS THAT HE HAD HAD AN OBLIGATION TO COMMUNICATE TO PETITIONERS

THE PLEA BARGAIN OFFER, DID PETITIONERS ESTABLISH SUCH INEFFECTIVENESS OF COUNSEL AS TO AMOUNT TO CAUSE THAT EXCUSED PETITIONERS' OMISSION TO PRESENT THEIR INEFFECTIVE ASSISTANCE CLAIM IN THEIR FIRST PETITION FOR HABEAS CORPUS?

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TO THE UNITED STATES COURT

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PETITION FOR A WRIT OF CERTIORARI

Carnell Bates and Darnell Bates, by their attorney, Carl Ziemba, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed in this cause on December 18,

1992. The court's Order denying rehearing and rehearing en banc was filed on February 9, 1993.

OPINION AND ORDER BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is unpublished. It is set forth in full below in the Appendix at 3a. The Order denying rehearing and rehearing en banc is set forth in the Appendix at 1a. The Report and Recommendation of the Magistrate Judge of the district court is set forth in the Appendix at 7a, and the Order of the district court filed April 6, 1992 accepting the Report and Recommendation and the judgment of the district court filed April 6, 1992 dismissing petitioners' application for writ of habeas corpus are set forth at 32a and 34a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals was entered December 18, 1992.

Timely motion for rehearing and suggestion for rehearing en banc was denied by Order filed February 9, 1993.

This Court's jurisdiction is invoked under 28 USC, Section 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the Assistance of Counsel for his defense.'

Section 2254(a), 28 U.S.C. provides:

'The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'

Rule 9(b), Rules Governing Habeas Corpus Proceedings provides:

'A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and dif-

ferent grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.'

STATEMENT OF THE CASE

Petitioners, who are twin brothers, were each charged separately in 1985 with premeditated murder in the first degree in the shooting death of a young man and with being in possession of a firearm in the commission of a felony. Their cases were consolidated and they were tried jointly to a jury in the Recorder's Court for the City of Detroit, Michigan.

Petitioners were represented on trial by a single attorney who happened to be their uncle. The evidence tended to establish that petitioners, who were each twenty years old, and the deceased were dealing in narcotics, that peti-

tioners suspected that the deceased was cheating them, and that petitioners confronted the deceased with their suspicions and in the ensuing brouhaha, petitioners shot and killed the deceased.

Petitioners' defense was alibi.

The jury convicted both petitioners of first degree murder and of the felony firearm count. The trial court sentenced each of the petitioners to life in prison with no hope of parole on the murder conviction and each to a term of two years on the felony firearm conviction.

Petitioners appealed their convictions to the Michigan Court of Appeals as a matter of right in timely manner, and that court affirmed their conviction in an unpublished opinion dated April 17, 1987. Petitioners' application for leave to appeal to the Michigan Supreme Court was denied by order dated April 17, 1987.

Petitioners then, on July 9, 1987, filed a joint petition for a writ of habeas corpus in

the United States District Court for the Eastern District of Michigan in which they raised the same issues which they had raised in their appeal as of right. These issues are irrelevant to the issues presented in this petition for certiorari. The district court denied the petition on January 28, 1988, and petitioners were denied a certificate of probable cause on March 31, 1989.

Thereafter, the father of the petitioners informed the appellate attorney for petitioners by telephone that he had recently learned that prior to trial, the state prosecutor had conveyed a plea bargain offer to trial counsel for petitioners which proposed that petitioners plead guilty to murder of the second degree [and the felony firearm charge] and that the prosecutor would recommend to the trial court a sentence of ten years to twenty years. However, trial counsel did not prior to trial communicate this plea bargain offer to the petitioners. It

was only after the jury had returned its guilty verdicts that trial counsel told the petitioners in court after the verdicts were announced that counsel should have allowed them to accept the plea bargain offer, and it was then, for the first time, that trial counsel told petitioners what the plea bargain offer was.

Petitioners' father asked appellate counsel whether there was any legal significance to these facts. Counsel assured him that there was, and counsel immediately thereafter, on March 31, 1988, filed a motion in the trial court praying for leave to file a delayed motion for a new trial and for an evidentiary hearing on the question of the effectiveness vel non of trial counsel in failing to communicate the prosecutor's plea bargain offer to petitioners before commencement of trial. Petitioners claimed in their motion for a new trial that their trial counsel had been ineffective in not communicating to them the prosecutor's plea bargain offer

and that their right under the 6th Amendment to the United States Constitution to effective assistance of counsel on trial was violated.

The state trial court granted petitioners leave to file a delayed motion for a new trial and, on June 1, 1988, conducted an evidentiary hearing on the question of the effectiveness vel non of trial counsel. The petitioners, the father of petitioners, and trial counsel testified on the evidentiary hearing. At the outset of the hearing, the court accepted a stipulation agreed by the parties that indeed, prior to trial, the prosecutor had conveyed a plea bargain offer to trial counsel which proposed that petitioners plead guilty to second degree murder [and the felony firearm count] and that the prosecutor would recommend a sentence of ten years to twenty years on the murder conviction. Petitioners testified that they had not been told by their trial counsel of the prosecutor's plea bargain offer prior to trial, and that the

first they heard of it was immediately after the jury had returned its verdicts when, while all three were still seated at counsel table, trial counsel stated that he should have allowed petitioners to accept the plea bargain offer and trial counsel told them what the offer was. Each petitioner testified that had he known of the plea bargain offer prior to commencement of trial, he would have accepted it. Trial counsel acknowledged in his testimony that he had not prior to trial communicated the plea bargain offer to petitioners. Petitioners also testified that neither one had told their appellate counsel these facts.

At the conclusion of the evidentiary hearing, the trial judge, accepting the prosecutor's argument, ruled that trial counsel had manufactured 'an appellate parachute' for petitioners, and that the court found no ineffectiveness on the part of trial counsel. The trial judge entered an order dated July 21, 1988 denying

petitioners' motion for a new trial.

Upon petitioners' application, the Michigan Court of Appeals granted petitioners leave to appeal from the order of the trial court denying their motion for a new trial, and the Michigan Court of Appeals, finding no ineffectiveness in trial counsel's performance, affirmed the denial of the motion for a new trial by opinion and judgment [unpublished] dated December 27, 1989. Thereafter, the Michigan Supreme Court on September 5, 1990 denied petitioners' application for leave to appeal from the judgment of the Michigan Court of Appeals.

Petitioners then on September 21, 1990 filed their second petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. In this petition, petitioners claimed that they had been deprived of effective assistance of counsel on trial, the same issue they had presented in their motion for a new trial in the state trial

court and in their appeal to the Michigan Court of Appeals on leave granted. The Magistrate Judge to whom the application was referred, found in his Report and Recommendation, entered March 9, 1992, that the record did not fairly support the state trial judge's conclusion that petitioners' trial counsel had manufactured 'an appellate parachute'; and he virtually found that petitioners' trial counsel had rendered ineffective assistance by failing to communicate the plea bargain offer to petitioners, and that neither petitioners nor their father could have been expected to recognize the legal significance of trial counsel's failure to communicate the plea bargain offer to petitioners.

However, the Magistrate Judge went on to hold in his Report and Recommendation that the facts underpinning petitioners' claim of ineffective assistance of counsel in their second petition for habeas corpus were available to them at the time of their filing their first petition for

habeas corpus, that petitioners had not shown cause for not having raised the claim in their first petition, and that therefore under Rule 9(b), Rules Governing Habeas Corpus Proceedings and under McCleskey v Zant, 499 US ____, 111 S Ct 1454 (1991), he had to recommend that the second petition for habeas corpus be dismissed as an abuse of the writ, and he did so.

The district judge, on April 6, 1992, entered an order by which he adopted the findings and recommendation of the Magistrate Judge and then entered, on April 6, 1992, an order dismissing petitioners' petition for habeas corpus without prejudice.

The petitioners filed a timely notice of appeal and the district court issued a certificate of probable cause. The Court of Appeals for the Sixth Circuit invoked a local rule which permitted the court to proceed to judgment in the absence of oral argument on the basis that oral argument was not needed, and affirmed the

judgment of the district court by Order dated December 18, 1992.

Petitioners timely filed a petition for rehearing with a suggestion that the court grant rehearing en banc. This motion was denied by Order dated February 9, 1993.

REASONS FOR GRANTING THE WRIT

I

Petitioners' position on the first question presented in this petition is the following:

> Since the state trial court, and the Michigan Court of Appeals and the Michigan Supreme Court did not invoke their own rules of procedure against petitioners and did not bar petitioners, because of their default of state procedural rules, from raising the new claim involving a federal constitutional right, and since the Michigan Court of Appeals addressed the federal constitutional

issue and adjudicated it adversely to petitioners, petitioners should not be required to show cause and prejudice in order to have their second habeas petition considered on the merits in federal district court on their second petition for habeas corpus.

The foregoing position is predicated on the following facts.

After petitioners were convicted in state court of murder, they took an appeal as of right to the Michigan Court of Appeals where their convictions were affirmed. The Michigan Supreme Court denied them leave to appeal. Having exhausted their state appellate remedies, petitioners filed an application for habeas corpus in federal court; it was denied, and a certificate of probably cause was denied them.

It was then that petitioners discovered that the failure of their trial counsel to communi-

cate to them before trial the prosecutor's plea bargain offer amounted to a privation of their right under the 6th Amendment to the federal constitution to effective assistance of counsel on trial. The petitioners sought to raise this new, federal constitutional claim to the state trial court through the office of a motion for a new trial. Michigan Compiled Laws 770.1 authorizes the bringing of a motion for a new trial, and 770.2 prescribes the time within which the motion must be filed. It was clear that the time for filing a motion for a new trial had long expired in petitioners' case. However, under state law, '[a] delayed motion for a new trial can always be filed at any time on leave granted by the trial court', People v Parker, 393 Mich 531, 541 (1975), and 'a trial court has inherent power to grant leave to file a delayed motion for a new trial in a case that was heard before him', Attorney General v Recorder's Court Judge, 341 Mich 461, 472

(1954). Accordingly, petitioners filed a motion in the state trial court praying leave to file a delayed motion for a new trial based upon their claim of ineffective assistance of trial counsel.

At this point, the trial court could have said to petitioners: 'Sorry, but you know what the rules are; you should have raised this new claim in your appeal as of right, and because you didn't, you are now foreclosed from raising this claim at this time'. Indeed, the state prosecutor, in opposing petitioners' motion, urged this course upon the trial court. And had the trial court done so, it most probably would have been on firm ground. In People v Fox, 97 Mich App 324, 330 (1980), the court noted that the defendant had not raised a particular issue to the court on his appeal as of right, nor did he do so in a petition for rehearing, and that under these circumstances '[t]he failure to raise the issue on appeal waives it'. This was

a procedural rule of long standing in the Michigan courts although it was, across the years, unevenly enforced. However, instead of ruling that petitioners' default of the said rule barred their filing a motion for a new trial, the trial court granted petitioners leave to file a delayed motion for new trial. The trial court then conducted an evidentiary hearing on the claim of ineffective assistance of trial counsel. And then, at the conclusion of the hearing, the trial court, addressing the federal constitutional issue involved in the claim, ruled that there was no violation of the federal constitution.

Petitioners then applied to the Michigan Court of Appeals for leave to appeal from the denial of new trial by the trial court. Certainly, petitioners did not have a right to appeal from the order of the Michigan Court of Appeals denying their motion for a new trial. Under Article 1, Section 20, Michigan Constitu-

tion 1963 and under Michigan Compiled Laws 600.309, a convicted defendant in a criminal case has one appeal as of right to the Michigan Court of Appeals. See People v Pickett, 391 Mich 305, 309-311 (1974). However, Michigan Court Rules of 1985, 7.205 [then extant and in force] allowed a criminal defendant to file an application for leave to appeal in the Michigan Court of Appeals and empowered that court to grant the application and grant whatever relief it thought just. 'While delayed applications for leave to appeal to the Court of Appeals may be filed, there is no constitutional, statutory or rule provision that a defendant shall have any right to a delayed appeal, whether indigent or non-indigent', People v Berry, 384 Mich 270, 273 (1970).

Again, the state prosecutor urged to the Michigan Court of Appeals that because petitioners had defaulted the rule that required them to raise all of their claims of trial error in

their appeal as of right, petitioners should be barred from raising the new claim to the Michigan Court of Appeals. See Appendix 39a-40a. There is no question that the Michigan Court of Appeals could have denied leave to appeal on the basis of the default urged by the state prosecutor. But, instead, the Michigan Court of Appeals granted petitioners leave to appeal, and then proceeded to consider petitioners' claim involving ineffective assistance of trial counsel, a violation of the federal constitution, on the merits and ruled that there was no violation of the federal constitution, and the Michigan Court of Appeals affirmed the trial court's denial of a new trial. See Appendix 36a ff.

Upon petitioners' application, the Michigan Supreme Court denied petitioners leave to appeal to the Michigan Supreme Court from the judgment of the Michigan Court of Appeals, not on the basis that their default of the procedural rule

barred their being heard in the Michigan Supreme Court, but instead on the basis that the court was 'not persuaded that the questions presented should be reviewed by this Court'. See Appendix, 41a.

In McClesky v Zant, 499 US____, 111 S Ct 1454 (1991), this Court was much concerned with the matter of injury to the state and with the uncertainty of finality of state judgments resulting from federal habeas corpus proceedings, and especially from a state criminal defendant's filing successive applications for writ of habeas corpus in federal court.

The Court enunciated principles and criteria to govern the determination whether a second or successive application for habeas corpus by a state prisoner was abusive of the writ. The Court's main pronouncement was that the standards incorporated into the rules which govern a federal court's permitting a state prisoner to file for habeas corpus in face of his having

defaulted a state procedural rule, as set forth in Wainwright v Sykes, 433 US 72 (1977), should govern whether a state prisoner will be permitted to file a second or successive petition for habeas corpus in which he sets forth a claim which he had not set forth in his first petition.

> '[T]he doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.' Id, at 1470.

In the present case, there is no, nor can there be any, injury to the State through the federal courts considering petitioners' new

claim in their second habeas petition because the State courts ignored any interest they had in the finality of their criminal judgments in this case and created an opportunity to address petitioners' new federal constitutional claim and to rule on it.

It is clear that after petitioners had completed their appeal as of right from their convictions, they came back to the state trial court and to the state appellate courts with a new federal constitutional claim, namely, that their trial attorney had rendered them ineffective assistance by failing to communicate the prosecutor's plea bargain offer to them prior to trial. The State courts could have foreclosed petitioners from raising this issue, but they did not. The State trial court granted petitioners leave to file a delayed motion for a new trial, and allowed petitioners to raise the present issue of ineffective assistance of counsel, and proceeded to adjudicate the this

federal constitutional issue on its merits adversely to the petitioners. And the Michigan Court of Appeals could have denied petitioners leave to appeal from the trial court's denial of their motion for a new trial on the basis of the State rule requiring that a convicted defendant bring all of his trial issues to the Court of Appeals in his appeal as of right. But, the Michigan Court of Appeals did not invoke the procedural rule, but instead granted petitioners leave to appeal and then proceeded to address and adjudicate the federal constitutional question of ineffectiveness of counsel on the merits. And the Michigan Supreme Court denied leave to appeal to petitioners not on the basis of a default of the State procedural rule, but simply on the basis that the court was not persuaded that the question presented should be reviewed by the court.

In these circumstances, where the state courts have had an opportunity to address the

federal constitutional question, and did address it, and did adjudicate it on the merits, and exhibited no interest in the finality of the judgments of conviction and sentence in this case, the controlling and operative question, petitioners respectfully submit, is whether a federal habeas corpus court should refuse to adjudicate the federal constitutional question involved.

The anomalous situation which this case presents is this: if petitioners had filed a petition for a writ of certiorari in this Court upon the denial of the Michigan Supreme Court to grant leave to appeal from the judgment of the Michigan Court of Appeals upholding the trial court's denial of a new trial, this Court would not have denied certiorari solely on the grounds that petitioners should have raised the ineffective assistance claim to the State appellate courts on their appeal as of right. This Court would have rightly concluded that if the state

courts chose to ignore the state's own procedural rules and chose to pass on a federal constitutional question, this Court could proceed to treat with the same federal constitutional question on certiorari if the Court elected to do so.

Still, the federal habeas court dismissed petitioners' second application for a writ of habeas corpus precisely on that basis. The fact that petitioners had not raised their ineffective counsel claim in the appeal as of right in the state appellate court would not have been deemed a disabling impediment to this Court's granting certiorari to entertain the issue of ineffective counsel since the state appellate court was not offended by petitioners' omission to raise the issue in their appeal as of right; but under the identical circumstances, the district court deemed itself disabled to entertain the same issue on a second application for habeas corpus.

This Court has held, in regard to the principles and standards enunciated in Sykes v Wainwright, supra, that when a state appellate court ignores its own rules of procedures which the defendant had defaulted and does not invoke them to bar a federal constitutional claim and proceeds to decide the claim on the merits, a federal habeas court violates no principle of comity by proceeding to entertain the same claim in habeas corpus. County Court of Ulster County v Allen, 442 US 140, 154 (1979). See also: Johnson v Mississippi, 486 US 578, 587-589 (1988); Herrera v Collins, ____US____, 113 S Ct 853, 863-864 (1993).

In short, this Court has held that if the state ignores its own rules of procedure and does not punish an appellant for defaulting them, then no harm is done to the state if the federal habeas court ignores the same state rules and considers the same issue.

Petitioners respectfully assert that logic and the same 'equity' of which the Court spoke in McCleskey v Zant, supra, at S Ct 1468, require that a federal habeas court apply the same principle enunciated in Ulster County, supra, to determine whether a petitioner for habeas corpus need show cause for a defaulted claim on his second petition.

In short, petitioners assert that they need not show cause and prejudice on a federal constitutional claim in their second petition for habeas corpus which was fully considered by the Michigan Court of Appeals and decided on the merits adversely to petitioners.

II

Another issue at the crux of this case is, if not simple, rather straightforward:

> Were the facts which formed the foundation for petitioners' claim of ineffec-

tive assistance of counsel on trial fairly available to them at the time they filed their first federal petition for habeas corpus?

In McCleskey v Zant, 499 US___, 111 S Ct 1454, 1468 (1991), this Court held that 'a petitioner may abuse the writ by failing to raise a claim through inexcusable neglect', and 'that the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse of the writ context', id, at 1468, and that the same 'showing of cause and prejudice' that will excuse a procedural default 'applies to determine if there has been an abuse of the writ through inexcusable neglect', id, at 1470, and '"the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court' and that '[o]bjective factors that constitute cause

include "'interference by officials'" that make compliance with the state's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel' and that '[i]n addition, constitutionally "ineffective assistance of counsel . . . is cause"', id, at 1470.

The differences in positions between the petitioners and the Magistrate Judge on this branch of the case turns on the question whether petitioners established cause for their omission to present the claim of ineffective assistance of counsel in their first habeas petition.

The question in the case at bench is the same question as stated by the Court in McCleskey: '[T]he question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process', id, at S Ct 1472.

For the proper resolution of this question, the following facts must be kept in mind.

First, there was nothing - no document, writing nor notation - in the records of this case in the state trial court which would have in any manner indicated or suggested to any one examining the records that the prosecutor had made any kind of plea bargain offer whatever to petitioners or to their trial counsel. An examination of the transcripts of the arraignments, pre-trial conferences and so forth do not reflect in any manner that the prosecutor had made a plea bargain offer to petitioners or to their counsel. Hence, there was nothing in the records of the case to alert petitioners' appellate counsel on their state appeal as of right that the issue here involved was potentially present in the case.

Second, the petitioners did not relate to appellate counsel that their trial counsel communicated to them the plea bargain offer only

after the jury had returned its verdicts. This was the finding of the Magistrate Judge. See Appendix 18a. The Magistrate Judge further stated that '[i]t appears also that [appellate counsel] never inquired of petitioners whether a plea offer had been made. . . . It is not alleged that [appellate counsel's] failure to specifically inquire whether a plea offer constituted ineffective assistance, nor would such a claim appear to be facially valid'. See Appendix 29a.

Third, the record made in the state trial court reflects that petitioners' trial counsel had not told petitioners about the plea bargain offer prior to the time the verdicts were returned; immediately after the verdicts were rendered trial counsel told petitioners of the plea bargain offer; he did not tell petitioners' father. [The Magistrate Judge misunderstood the testimony of the father on this point.] According to the testimony given on the evidentiary

hearing in the state trial court by the father of petitioners, the officer in charge of the case said to the father immediately after the jury returned its verdicts that 'your boys should have took the plea bargain', and the officer then told Mr Bates what the plea bargain offer was (Evid Tr 26-27).

At this point, the father knew only that a plea bargain offer had been made by the prosecutor and that the petitioners had not 'took' it. These were 'facts', but legally they were meaningless. The fact that a defendant was offered a plea bargain by the prosecutor and the fact that the defendant didn't take it have utterly no legal significance. Appellate 'hay' cannot be made of such facts. It was three years later, in the early part of 1988, that petitioners' trial counsel told the father, Mr Eugene Bates, that '[h]e didn't tell them [petitioners] nothing about the plea bargain', and it was then that Mr Bates thought it impor-

tant enough to bring the matter to the attention of appellate counsel (Evid Tr 30-31). Upon being informed of these 'facts', appellate counsel immediately recognized their significance in connection with the legal principle that counsel is under duty to communicate all plea bargain offers to his client.

Fourth, the Magistrate Judge found that 'it can be assumed that none of the Bates family knew the legal significance of [trial counsel's] failure to [] inform them [of the prosecutor's plea bargain offer]'. See Appendix 28a.

However, the Magistrate Judge ruled that this ignorance of the law made no difference:

> 'While it can be assumed that none of the Bates family knew the legal significance of Elliott's failure to so inform them, that fact is irrelevant to a determination of whether "cause" exists for failing to raise the claim. As long as the factual and legal bases

> for the claim existed at the time of the filing of the first petition, the petitioner's failure to recognize it is irrelevant.' Rodriquez, 948 F.2d at 685-86. It is now clear that the failure of counsel or a pro se petitioner to recognize the factual or legal basis for a claim does not constitute cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 486-87 (1986); Rodriquez, 948 F.2d at 688 (and cases cited therein). See Appendix 28a-29a.

Petitioners' position here is that the legal facts were not fairly available to petitioners because they didn't have the legal knowledge to realize that their federal constitutional right had been violated; that their ignorance was something external to them and to their defense; and that knowledge of the constitutional principle could not be fairly attributed to them. The Magistrate Judge took a different view, as

we saw above.

However, it is respectfully urged that the Magistrate Judge overlooked the proposition that conceptually, a factual basis and legal basis for a claim cannot be separated. A 'fact' in a law suit is not a fact unless and until it is connected with a legal theory or principle. Many so-called facts in a legal case should more properly be called phenomena rather than facts. A fact in a legal case is a phenomenon which has legal significance in a legal context. There are many 'facts' in a case of which the trial court does not want to hear because they are irrelevant to the issues. It takes a trained lawyer to recognize what 'facts' are relevant facts, and he does this on the basis of his knowledge of legal principles. Without the context of legal principles, no 'fact' is a legal fact. Only lawyers and judges in a case are expected to recognize what are the relevant legal facts in a case.

The entire concept of relevancy in rules of evidence is a reflection of this conceptual truth. In a trial, counsel attempts to introduce some 'fact' into evidence through testimony; the court inquires what its relevance is. In other words, the court's inquiry is: what is the importance of the testimony which you intend to introduce, what has it got to do with the legal propositions which are involved in this case?

What lawyer has not been plagued by a client's insisting that he call this witness and that to testify to this 'fact' and that 'fact' which have nothing to do with the issues in the case. The client, untrained in the law, doesn't have the ability to distinguish between those 'facts' which are legally relevant to his case and those which are not. That is the job of the lawyer.

It is respectfully suggested that the Magistrate Judge might more properly have stated that the phenomenon of a plea bargain offer having

been made by the prosecutor and the phenomenon of petitioners' trial attorney not communicating this offer to the petitioners were known to the petitioners immediately after the verdicts were rendered in the state trial court. And the Magistrate Judge might have more properly concluded that because of their youth, and their total ignorance of law, petitioners didn't recognize these phenomena to be facts which translated into the legal principle of ineffective assistance of counsel. Petitioners could not translate these two phenomena into a constitutional claim because they were ignorant of the principle that a lawyer has the legal duty to communicate all plea bargain offers of the prosecutor to his client.

This concept that legal fact is fact wedded to legal principle is implicit in the rule set forth in Reed v Ross, 468 U.S. 1, 16 (1984):

> '[W]e hold that where a constitutional claim is so novel that its legal basis

> is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.' [emphasis added]

In short, what this Court meant was that even though the 'facts' underlying a claim are known to counsel, if he fails to recognize their legal significance because the legal principle which gives them legal significance is so novel that it never had been expostulated by the courts, then counsel cannot be expected to recognize the legal significance of the 'facts', and there is cause for his not raising the claim to the state court.

The operative and controlling question here is whether such ignorance in the petitioners of the legal principle here involved was 'excusable'. Can petitioners be 'fairly' charged with knowing that an attorney has a legal duty to communicate all plea bargain offers to his

client and that his failure to do so amounts to the rendering of ineffective assistance which in turn is a violation of sixth amendment guaran tees to the assistance of counsel on trial?

When the Magistrate Judge stated [Appendix 30a], that the 'lapse' of petitioners' not communicating 'these facts until some three years later' was 'quite understandable', the Magistrate Judge came very close to finding that petitioners cannot be fairly charged with knowing that the non-communication by their trial attorney to them of a plea bargain offer embodied a constitutional claim. It was quite understandable, it is respectfully urged, because petitioners could not fairly be expected to realize the importance of these two phenomena - the making of the plea bargain offer and their trial lawyer's failure to tell them about it.

The court in Smith v Collins, 977 F2d 951 (CA5 1992) recognized that a 'factual basis' may not be available to a petitioner under a McCles-

key test if the petitioner did not realize the legal import of the facts which he knew. In that case, the petitioner knew that two witnesses who testified in his state trial also served as bailiffs to the court during his trial, but what the petitioner did not know was that in law, a trial is rendered invalid when the same person testifies as a witness and serves as a bailiff in the same case. In treating of the petitioner's claim that the 'facts' of his claim were not fairly available to him at the time he filed his first federal habeas petition, the court said:

> 'Smith insists that he has demonstrated sufficient "cause" for his failure to object to the 1952 conviction at his 1977 trial. Smith reasons that while the legal basis for his claim had been available since 1965, the factual basis was not available to his counsel. This argument has some appeal. While Smith clearly knew that two of the witnesses

in his 1952 trial also served as bailiffs, he was unaware of the legal significance of those facts - namely, that if a person serves as both a bailiff and a witness in the same trial, the conviction is invalid. [citation omitted] Because Smith attached no significance to the two witnesses serving as bailiffs during his 1952 trial, he did not mention that fact to his attorney in 1977 when his attorney questioned him about the prior convictions. As found by the state trial court and confirmed by our review of the record, there was nothing in the record of the 1952 conviction reflecting that the sheriff and deputy sheriff, who each testified as witnesses, had also both served as bailiffs in the trial. Accordingly, Smith's attorney, a person charged with knowledge of the legal significance of facts, was never alerted that two of the material witnesses also served as bailiffs in the case.' Id, 977

F2d at 956-957.

The court in Smith held, nonetheless, [dubiously in petitioners' opinion], that Smith had 'not demonstrated cause to overcome the procedural bar' because the 'facts' were available to Smith's attorney since there was nothing in the record 'in this small county where in 1952 the trial was held' to suggest that the sheriff and the deputy sheriff, who clearly were witnesses, did not so serve as bailiffs, id, 977 F2d at 957-958.

The Magistrate Judge stated in the instant case that to establish cause, petitioner must show some external impediment that prevented petitioners or counsel from constructing or raising the issue, and that '[t]his means that there must be some external factor which impeded the petitioners' ability to raise the claim previously'. See Appendix 28a. The Magistrate Judge based this statement primarily upon language found in McCleskey, supra.

The Court in McCleskey said that '[f]or cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim'. Id, at S Ct 1472.

The key word in the formula enunciated by McCleskey is 'external'. The Court in McCleskey did not define 'external'. The Court merely quoted language from Murray v Carrier, supra:

> '[C]ause . . . requires a showing of some external impediment preventing counsel from constructing or raising a claim'. (emphasis by the Court in McCleskey). Id, 111 S Ct at 1472.

Turning to Murray v Carrier, for further clues to the meaning of 'external', we find the following language:

> '[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show

> that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.' Id, 477 US at 488.

The Court in Murray gave two examples of 'such objective impediments': (1) 'a showing that the factual basis for a claim was not reasonably available to counsel, see Reed v. Ross, 468 U.S. at 16'; and (2) '"some interference by officials" (citation omitted), made compliance impracticable'. Id, 477 US at 488.

Turning to Reed v Ross, supra, 468 U.S. at 16, we find the following language which is not particularly helpful in defining what is 'external' to the defense:

> '[W]e hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.'

However, in Coleman v Thompson, ____US____, 111 S Ct 2546 (1991), we find that the Court further expatiated on the meaning of 'external'. Referring to Murray, supra, the Court said:

> 'We explained clearly that "cause" under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him: . . .' Id, at 2566. (first emphasis by the Court; second, added)

Petitioners' position here is that they didn't have the knowledge to realize that their constitutional right had been violated, that their ignorance was something external to them, and that knowledge of the constitutional principle could not be fairly attributed to them.

Hence, it is respectfully urged, petitioners clearly established in the district court that 'the factual or legal basis' for their claim of ineffective assistance from trial counsel was not available to them or to their appellate

counsel.

III

It is petitioner's position on this branch of the case that their trial counsel rendered them ineffective assistance when he failed to acquit his duty of informing them of the prosecutor's plea bargain offer prior to trial, and that then trial counsel compounded his ineffective service by omitting to inform them that indeed he had a legal duty to inform them of the plea bargain offer before they went to trial and that petitioners should urge to their appellate counsel to pursue this issue on their appeal as of right. Trial counsel acted professionally unreasonably under the circumstances and that his actions prejudiced petitioners. Strickland v Washington, 466 US 668,688,692 (1984)

The fact that their trial counsel did not communicate the plea bargain offer to petitioners was meaningless to petitioners in a legal

sense because it was not conjoined to knowledge of the legal principle that their trial counsel had a duty to tell them of the offer. The only person who could have apprised the petitioners of the legal significance of the fact of non-communication was trial counsel himself, a person from whom, the Magistrate Judge determined 'in all likelihood, petitioners did not have the benefit of effective assistance of counsel as guaranteed by the sixth amendment' [Appendix 27a].

Thus, in a very real sense, petitioners' failure to raise this issue in their first habeas petition resulted from 'a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i.e., "imputed to the State"'. See Coleman v Thompson, ____US____, 111 S Ct 2546, 2567 (1991).

A factual situation somewhat similar to that found in the instant case in Dawan v Lockhart, 980 F2d 470 (CA8 1992), led the court to con-

clude that the petitioner had shown cause. Dawan's attorney at his state trial had also represented another man who had pleaded guilty to the same crime and implicated Dawan. Dawan asserted that his attorney did not properly cross-examine this man when he was called as a witness in Dawan case because of the attorney's conflict of interest. The court held that Dawan had shown cause for having defaulted the issue of his attorney's conflict of interest on trial:

> 'We find unreasonable, however, Darwan's attorney's failure to tell the Court of his conflict of interest and to request new counsel. This prejudiced Dawan by leaving him essentially unrepresented at the post-trial proceedings with respect to the conflict-of-interest question and denying him subsequent review of this issue.'

Hence, petitioners respectfully urge that they had established in the district court cause for not having raised their ineffective counsel

issue by showing that it was the very ineffectiveness of counsel of which they were complaining which prevented their raising the issue in their first habeas petition.

CONCLUSION

Petitioner prays this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Carl Ziemba
Attorney for Petitioner
Attorney of Record
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Detroit, Michigan 48201
(313) 833 5145

Detroit, Michigan
February 28, 1993

APPENDIX

ORDER DENYING REHEARING AND REHEARING EN BANC
FILED FEB 9, 1993 UNITED STATES COURT OF APPEALS

No. 92-1487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARNELL BATES; DARNELL K. BATES,

Petitioners-Appellants

v. ORDER

PAMELA K. WITHROW, WARDEN,

Respondent-Appellee

BEFORE: GUY AND NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues

raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT: FILED DECEMBER 18, 1992

No. 92-1487

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARNELL BATES; DARNELL K. BATES,

Petitioners-Appellants,

v. ORDER

PAMELA K. WITHROW, WARDEN,

Respondent-Appellee

NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: GUY and NORRIS, Circuit Judges, and PECK, Senior Circuit Judge.

Carnell and Darnell K. Bates, twin brothers, appeal the dismissal of their petition for a writ of habeas corpus filed under 28 U.S.C. 2254. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel

unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Following a jury trial in the City of Detroit, Michigan, Recorder's Court in September 1985, petitioners were convicted of first-degree murder and of the use of a firearm in the commission of a felony. Petitioners' convictions were affirmed by the Michigan Court of Appeals on direct appeal and the Michigan Supreme Court denied leave to appeal. Thereafter, petitioners filed an initial joint habeas petition in the district court, alleging claims unrelated to the instant case. The district court denied the petition and this court denied petitioners a certificate of probable cause to appeal.

While their initial 2254 action was pending, petitioners sought post-conviction relief in the state trial court. As grounds for relief, petitioners alleged that trial counsel (petitioners' uncle) failed to communicate a plea bargain offer made to them by the prosecutor. The trial court denied petitioners post-conviction relief following an evidentiary hearing and

the Michigan Court of Appeals affirmed the judgment on appeal. The Michigan Supreme Court denied leave to appeal.

Next, petitioners filed the instant petition for habeas relief in the district court, again alleging ineffective assistance of counsel. The district court concluded that petitioners abused the writ and dismissed the petition without prejudice. The district court issued a certificate of probable cause to appeal.

Generally, dismissal of a habeas petition as an abuse of the writ will be reviewed for abuse of discretion. Lonberger v. Marshall, 808 F.2d 1169, 1173 (6th Cir.), cert. denied, 481 U.S. 1055 (1987). A petition for habeas corpus relief may be dismissed as an abuse of the writ where a petitioner had an earlier opportunity to raise a claim and either deliberately abandoned the claim or failed to raise the claim through inexcusable neglect. McCleskey v. Zant, 111 S. Ct. 1454, 1467-68 (1991). A petitioner then must show cause for his failure to raise a claim omitted from an earlier petition through inex-

cusable neglect and must show prejudice therefrom. Id. at 1468-70. To establish cause for his failure, petitioner must show an external impediment, e.g., "government interference or the reasonable unavailability of the factual basis for the claim." Id at 1472.

Upon consideration, we conclude that the district court did not abuse its discretion in dismissing the instant petition as an abuse of the writ for the reasons stated in the magistrate judge's report and recommendation filed March 9, 1992, and accepted by the district court by its order filed March 31, 1992. The facts underlying the ineffective assistance of counsel claim were available to the petitioners immediately after trial. The issue therefore should have been raised in their first petition.

Accordingly, the judgment of the district court is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Lawrence Green

Clerk

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE: ENTERED MARCH 9, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

CARNELL AND DARNELL BATES,

Petitioners,

vs. CIVIL NO.: 90-CV-40256-FL
HON. STEWART A. NEWBLATT

PAMELA WITHROW,

Respondent
_____/

REPORT AND RECOMMENDATION

FACTS AND PROCEDURAL HISTORY

This is a joint petition for writ of habeas corpus. Petitioners, who are brothers, were found guilty on September 12, 1985 of first degree premeditated murder and use of a firearm in the commission of a felony following a consolidated jury trial in the Recorders Court for the City of Detroit. (1) The petitioners

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(1) The evidence at trial revealed that the defendants were drug dealers and that they shot and killed an associate whom (sic) they believed was cheating them.

were each sentenced to terms of life in prison on the murder conviction, and to two-year consecutive sentences on the felony firearm conviction.

At trial, both petitioners were represented by Leodis Elliott, who also happened to be their uncle. Following their convictions, the petitioners retained attorney Carl Ziemba to represent them on appeal. (2) Mr. Ziemba filed an appeal as of right in the Michigan Court of Appeals for each petitioner. The issues raised in each appeal were identical. The were presented as follows:

> 1) Was the defendant deprived of his right under the Fourteenth Amendment to the United States Constitution and under Section 17, Article 1, Michigan Constitution 1963, to have the prosecution prove each and every element of the

(2) Mr. Ziemba continues to represent them on this petition for writ of habeas corpus.

crime charged against him beyond a reasonable doubt when he was convicted of premeditated murder in the first degree when the prosecution failed to adduce sufficient evidence to convince any rational trier of the fact of the element of premeditation beyond a reasonable doubt.

2) Was the defendant deprived of his right to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and under Section 18 (sic), Article 1, Michigan Constitution 1963, when the trial judge gave an erroneous and confusing instruction on the defendant's only defense, that of alibi.

On April 17, 1987, the Michigan Court of Appeals affirmed the convictions of the petitioners. [Michigan Court of Appeals Docket Nos. 93151 and 93152].

Petitioners then filed an application for leave to appeal in the Michigan Supreme Court,

raising the same issues as presented to the Court of Appeals. On June 26, 1987, the Supreme Court denied each application [Docket Nos. 80724 and 80725].

On July 9, 1987, the petitioners filed a joint petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The matter was assigned to the Honorable Anna Diggs Taylor. In this petition, the petitioners raised the same two issues presented to the Michigan courts. On January 28, 1988, Judge Taylor issued a memorandum opinion order denying the petition for writ of habeas corpus. In that opinion, Judge Taylor found that there was no merit to petitioners' claim of insufficient evidence to support the convictions and further, determined that the jury instruction claim was procedurally barred and alternatively, was without merit. See Bates v. Withrow, No.87-CV-72569-DT (E.D. Mich. 1988). A claim of appeal was filed in the United States Court of Appeals for the Sixth Circuit. However, on March 31, 1989, the court declined to issue a certifi-

cate of probable cause.

In January or February of 1988, while the first petition for writ of habeas corpus was pending, Mr. Ziemba was informed by Eugene Bates, petitioners' father, that a plea offer had been communicated to petitioners' attorney Leodis Elliott prior to the commencement of trial. This plea offer would have allowed petitioners to plead guilty to second degree murder and to the felony firearm charge with a sentence recommendation of 10-20 years imprisonment on the murder charge, and two years on the felony firearm conviction. Eugene Bates told Mr. Ziemba that Elliott had not communicated the plea offer to petitioners until after the jury had returned their verdict. He requested that Mr. Ziemba investigate this claim to determine whether it had any legal significance.

On March 31, 1988, after confirming these facts with petitioners, Mr. Ziemba filed an application for leave to file a delayed motion for new trial and a request for an evidentiary hearing in the trial court. In this motion, the

petitioners alleged that they were denied effective assistance of counsel by their trial counsel's failure to inform them of the prosecutor's plea offer before trial. The trial court granted petitioners' motion for leave to file a motion for new trial, and granted petitioners an evidentiary hearing on the allegations of ineffective assistance of counsel.

This hearing was held on June 1, 1988. As a preliminary matter, it was stipulated that prior to trial, the prosecution had in fact made an offer to reduce the charge of first degree murder to second degree murder, with a recommendation of a ten-year minimum sentence. Both petitioners testified at the hearing. Darnell Bates testified that his attorney had never told him that the prosecutor offered a plea bargain prior to the commencement of trial. He stated that he was first informed of the plea bargain after the jury had announced its verdict. He recounted that immediately after the verdict was returned, his lawyer stated, "I should have went on and let you guys plead guilty to the plea

bargain." When he asked Elliott to explain, Elliott stated that "they had brought him ten to twenty, but he felt that he could beat the case." Darnell Bates claimed that during the trial he repeatedly asked his attorney if he could get a plea bargain, but that Elliott told him not to worry. Darnell Bates testified that he had never related these facts to Mr. Ziemba. He testified, however, that if the plea bargain had been communicated to him, he would have accepted it.

Carnell Bates also testified that Leodis Elliott had never informed him of the plea offer prior to the commencement of trial. His recollection of the first time he heard of the plea offer was the same as that of his brother. Carnell Bates stated that "in this courtroom sitting at this defense table, his attorney told him that he should have let us take a cop of ten to twenty second degree." Carnell Bates testified that he never informed his appellate attorney of this incident and that his appellate attorney had not asked him about a plea offer.

Although Carnell Bates continued to deny his guilt of the murder at the hearing, he testified that had he known of the plea offer, he would have pled guilty.

Eugene Bates, the father of petitioners, testified that Leodis Elliott was the brother of his wife. He stated that he too had heard nothing about a plea bargain offer before trial. The first he knew of the plea offer was after sentencing when the officer in charge of the case told him that "your boys should have taken the plea bargain." At that time, the officer informed him of the terms of the plea bargain.

Eugene Bates further testified that on February 9, 1988, he had a discussion with his brother-in-law, Leodis Elliott. He testified that Elliott told him that "at the time that Carnell and Darnell was on trial, he (Elliott) was using drugs and he didn't have to go through the trial and the case at all like he should have." In that discussion, Elliott admitted that "he didn't tell them nothing about the plea bargain. He felt that he could win the case."

Eugene Bates testified that he immediately informed Mr. Ziemba of the conversation with Leodis Elliott, resulting in the filing of the delayed motion for new trial.

Leodis Elliott also testified at the hearing. (3) He acknowledged that a plea offer had been made by the prosecution which would have allowed petitioners to plead guilty to second degree murder with a recommendation of 10-20 years imprisonment. Mr. Elliott initially stated that he did not tell the petitioners of the plea offer because a decision had already been made to go to trial. However, later in his testimony, he stated "as best as I can recall, I think all of us made the decision [to go to trial]. Like I said, I'm not sure if I informed them about the plea bargain. I think we discussed the pros and cons of going to trial."

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(3) It appears that Elliott had evaded service of a subpoena, but happened to be in the courthouse on the date of the hearing on another matter and then was subpoenaed to testify.

At the close of the evidentiary hearing, Mr. Ziemba argued that the failure of Elliott to inform petitioners of the plea offer amounted to ineffective assistance of counsel. The prosecutor argued that Elliott had deliberately withheld the information in order to manufacture grounds for appeal. In an oral decision from the bench, the trial judge denied the motion for new trial. He stated:

> I would say here I find no ineffective assistance of counsel. I would adopt the arguments of Mr. Roberts [the state prosecutor]. Certainly Mr. Elliott had adopted an appellate parachute. But the thing that bothers me with the whole thing is, and I don't know whether either one of you touched the question, but there is no assurance here that even if this plea agreement was accepted by the defendants, and there is no assurance that I would have accepted it, which would have been a necessary part of the agreement. The other part that

> bothers me is apparently both defendants will maintain their innocence. How could then could [sic] they plead guilty. Certainly in Michigan a necessary element of the plea that the defendant admit his wrongdoing.

The argument and finding that Elliott had adopted an "appellate parachute" was based upon the testimony of Darnell Bates, who stated that immediately after the verdict, when he expressed concern over Elliott's failure to inform him of the plea bargain, Elliott stated "don't worry about it, I can it back for you on appeal." This testimony was repeated on cross-examination. When asked whether or not he felt it was important that his attorney hadn't told him about the plea offer, Darnell Bates testified again ". . .he told me don't worry about. He will get it back for me on appeal." Based upon this testimony, the state prosecutor argued that Elliott had built an appellate parachute for his nephews. The trial court accepted this argument.

Petitioners appealed the trial court's decision to the Michigan Court of Appeals. In an opinion dated December 27, 1989, the Court of Appeals affirmed the decision of the trial court. In its opinion, the court recognized and accepted the trial judge's finding that the defendants first knew about the plea bargain at the time of the verdict. However, the court then found that the Bates and their uncle had in fact manufactured this issue as "an appellate parachute." (4) The court then went on to note that special deference need be given to the trial court's findings on the credibility of witnesses, particularly when the issue hinges entirely on the credibility determination. The court further found that since the error in the case did not contribute in any way to the verdict [emphasis by magistrate judge], it was harmless. Finally, the court stated that because both defendants maintained their innocence at

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(4) How the petitioners could have assisted in manufacturing an "appellate parachute" when they did not know of a plea offer until after the trial was never explained by the Court of Appeals.

the evidentiary hearing, it would have been impossible for them to enter a plea of guilty.

Petitioners then filed an application for leave to appeal in the Michigan Supreme Court. In an order dated September 5, 1990, the court denied leave to appeal. Justices Levin and Archer dissented from the denial stating that they would remand the case to the Recorder's Court for further factfinding.

On September 21, 1990, the petitioners filed this petition for writ of habeas corpus. On April 22, 1991, the respondent filed an answer to the petition, inexplicably alleging that the trial court had implicitly found that the petitioners knew of the plea offer prior to the commencement of trial and urging the court to apply the presumption of correctness to that implicit finding as well as the finding that Leodis Elliott had attempted to create an appellate parachute for them. See Sumner v. Mata, 449 U.S. 539 (1981).

Following a telephone status conference on June 4, 1991, at which time I conveyed to the

attorneys for the parties my preliminary conclusion that the state court's factual determination was not fairly supported by the record and therefore that I would not apply the presumption of correctness, see 28 U.S.C 2254(d)-(8), I set the matter for an evidentiary hearing. On June 17, 1991, the respondent filed a motion to deny such an evidentiary hearing, asserting that none of the exceptions to the application of the presumption of correctness under 28 U.S.C. 2254(d) were present. Accompanying the motion to deny the evidentiary hearing was a motion to dismiss the petitioners' writ of habeas corpus as being an abuse of the writ, relying on the case of McClesky v. Zant, 111 S.Ct. 1454 (1991) which had been decided by the United States Supreme Court on April 16, 1991. Respondent claimed that by not raising the ineffective assistance claim in the first petition for writ of habeas corpus, the petitioners had waived their right to present it. It is this motion that is the subject of this report and recommendation. Also pending before

the court is petitioners' motion for summary judgment. However, in view of my decision in this case, that motion need not be discussed.

Applicable Legal Principles

Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Under the rule, there are two distinct bases for dismissing a second habeas petition. When a petition raises the identical issue or issues previously raised and decided adversely on the

merits, controlling weight must be given to the previous denial unless the ends of justice would not be served. See Sanders v. United States, 373 U.S. 1, 15 (1963). This is generally referred to as a successive petition.

Claims which are raised for the first time in a subsequent petition are commonly referred to as abusive petitions. Andrews v. Deland, 943 F.2d 1162, 1171 (10th Cir. 1991). This is true whether or not the failure to present the claim in the initial petition was a matter of deliberate abandonment or arose through inexcusable neglect. Delo v. Stokes, 495 U.S. 320 (1990); Antone v. Dugger, 465 U.S. 200, 205 (1984). Because petitioners did not raise the issue presented here in their first petitions (sic), only the issue of abusive petitions need be examined.

In McCleskey v. Zant, 111 S. Ct. 1454, 1476 (1991), the Supreme Court held that the cause and prejudice test applicable to procedural defaults also applies to determine whether there has been an abuse of the writ through inex-

cusable neglect. Where claims are raised for the first time in a second or subsequent petition, the petitioner is required to show both cause for the failure to raise the claim earlier, as well as actual prejudice arising from the claimed error. McCleskey, 111 S.Ct. at 1470; Andrews, 943 F.2d at 1171. Even when cause and prejudice cannot be established, federal courts retain the authority to issue the writ if the petitioner can show that the failure to do so will result in a fundamental miscarriage of justice, that is, when the constitutional violation probably has caused the conviction of a person innocent of the crime. McCleskey, Id.

Under McCleskey, in order to show cause excusing a failure to raise a claim in a previous petition, the petitioner must first show that he was impeded in raising the claim by some external factor such as government interference or the unavailability of the factual basis of the claim. See also, Andrews v. Deland, 943 F.2d at 1171. In determining whether cause has been established, McCleskey directs that the conduct

of the petitioner be examined:

> . . .the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through habeas process.

111 S.Ct. at 1172. McCleskey thus puts the burden on the petitioner to conduct a reasonable and diligent inquiry in order to raise all relevant claims in the initial petition. Only then is the issue or prejudice arising from the claimed error examined. With these principles in mind, I will now analyze the petitioners' response to respondent's motion.

Analysis

A.

Petitioners initially claim that respondent's motion must be dismissed because the state has failed to "plead an abuse of the writ with particularity" as required by McCleskey. Peti-

tioners claim that the respondent has merely alleged that the petitioners filed a previous petition for writ of habeas corpus and that such an allegation does not fulfill the particularity requirement of McCleskey

This contention is without merit. In Russell v. Collins, 944 F.2d 202, 205 (5th Cir. 1991), the court stated that under McCleskey, the initial burden is on the state to outline the prior writ history with clarity and particularity, identify the claims raised in the prior writ, and allege abuse of the writ. The burden then shifts to the petitioner to disprove the claim of abuse, including a showing of why the claim was not raised in the first petition.

Although in this case the motion to dismiss does not identify the prior writ history or grounds for dismissal with particularity, the accompanying brief in support of the motion to dismiss explicitly satisfies the burden established by McCleskey. In that brief, the state has given a complete procedural history of the case, identified the prior writ history and the

issues raised therein, and has clearly alleged an abuse of the writ. This is more than adequate to satisfy McCleskey. Simply because the facts and allegations relating to the claimed abuse of the writ are placed in the brief, rather than the motion, does not render the state's pleading inadequate. Accordingly, I conclude that the state has adequately met its burden.

Petitioners also argue that because the respondent did not raise the issue of abuse of the writ in its initial response to the petition, he is now barred from doing so. This argument is also without merit. There is absolutely nothing in the case law or statutes which mandates that the failure to allege abuse of the writ in the initial response to a petition results in the waiver of that claim. The filing of the motion to dismiss within a short time of the McCleskey decision constitutes a timely filing. (5)

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(5) It must be noted that respondent's initial reply to the petition was signed and mailed by counsel on April 16, 1991, the day McCleskey was decided.

B.

The next issue to be resolved is whether petitioner's (sic) have shown adequate cause, as that term is defined in McCleskey, for their failure to raise the issue in their first petition. Having reviewed McCleskey, as well as cases decided since the decision in McCleskey, I must reluctantly (6) conclude that cause has not been established and must recommend that this petition be dismissed as abusive.

It is now well established, as mentioned earlier, that "cause requires a showing of some external impediment that prevents the petitioner or counsel from constructing or raising the issue." Rodriquez v. Maynard, 948 F.2d 684, 687

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(6) My conclusion is reached reluctantly because my preliminary review of the record leads me to conclude that the state court's factual findings of an "appellate parachute" are not substantially supported by the record as a whole and that, in all likelihood, petitioners did not have the benefit of effective assistance of counsel as guaranteed by the sixth amendment. See Strickland v. Washington, 466 U.S. 468 (1984); United States ex rel Caruso v. Zelinsky, 689 F.2d 435, 438 (7th Cir. 1982).

(10th Cir. 1991); Andrews v. Deland, 943 F.2d at 1171. This means that there must be some external factor which impeded the petitioners' ability to raise the claim previously. Rodriquez, Id.; McCleskey, 111 S.Ct. at 1470.

Here, it cannot be said that there existed an external factor preventing the issue from being raised. There is no claim of any governmental interference preventing petitioners from raising the claim. Similarly, it cannot be said that the facts were unavailable to petitioners. While it is uncontested that Mr. Ziemba did not know of the facts giving rise to the issue until after the first habeas petition was filed, this is not sufficient to establish cause under McCleskey. This is so because the record is clear that both petitioners, as well as their father, knew that Elliott had not conveyed the plea offers to them immediately after the verdict was rendered in 1985 (sic). While it can be assumed that none of the Bates family knew the legal significance of Elliott's failure to so inform them, that fact is irrelevant to a determination of whether

"cause" exists for failing to raise the claim. As long as the factual and legal bases for the claim existed at the time of the filing of the first petition, the petitioner's failure to recognize it is irrelevant. Rodrigues, 948 F.2d at 685-86. It is now clear that the failure of counsel or a pro se petitioner to recognize the factual or legal basis for a claim does not constitute cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 486-87 (1986); Rodriguez, 948 F.2d at 688 (and cases cited therein).

Here, the factual basis for the claim existed in 1985. Neither petitioners nor their father informed their attorney of these facts until some three years later, long after the filing of the initial habeas petition. (7)

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(7) It appears also that Mr. Ziemba never inquired of petitioners whether a plea offer had been made. While ineffective assistance of counsel may constitute cause for failing to raise an issue in the initial petition, error which falls short of ineffective assistance will not. Murray v. Carrier, 477 U.S. 478, 488 (1986). It is not alleged that Mr. Ziemba's failure to specifically inquire whether a plea offer constituted ineffective assistance, nor would such a claim appear to be facially valid.

While this lapse was apparently inadvertent and quite understandable, it is not sufficient to establish cause under McCleskey. Where the basis for the claim was available and there is no external impediment preventing counsel from learning of or raising the claim, McCleskey requires that the petition be dismissed. (8) According, I so recommend.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. 636(b)(1), the parties are hereby notified that within ten days

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(8) While the failure to establish cause may be excused where the constitutional violation results in a fundamental miscarriage of justice, that exception is not applicable here. Although the conduct of Leodis Elliott may have resulted in a "miscarriage of justice" in literal terms, it did not so result in legal terms. In order to establish a fundamental miscarriage of justice which would permit review of petitioners' claims on the merits, it must be shown that the alleged constitutional violation probably resulted in the conviction of an innocent person. McClesky (sic), 111 S.Ct. at 1474-75; Murray v. Carrier, 474 U.S. 478, 496 (1986). The petitioners in this case are clearly not innocent persons within the meaning of McCleskey and Murray. As both Michigan and federal courts have found, the evidence was more than sufficient to support convictions for first degree murder.

after being served with a copy of this recommendation they may serve and file specific, written objections to the proposed findings and recommendations. Further, either party may respond to another party's objections within ten days after being served with a copy thereof. The parties are further informed that failure to timely file objections may constitute a waiver of any further right of appeal to the United States Court of Appeals. United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

/s/ Marc L. Goldman

United States Magistrate Judge

Dated: March 9, 1992

ORDER ACCEPTING MAGISTRATE'S REPORT AND RECOMMENDATION ENTERED: April 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

CARNELL AND DARNELL BATES,

Petitioners

vs.

CIVIL NO.: 90-CV-40256-FL
HON. Stewart A. Newblatt
HON. Marc L. Goldman

PAMELA WITHROW,

Respondent
_____/

ORDER ACCEPTING MAGISTRATE'S REPORT AND RECOMMENDATION

The Court having reviewed the Magistrate's Report and Recommendation, filed on March 9, 1992, as well as any objections filed thereto*,

IT IS ORDERED that the Report is accepted and entered as the findings and conclusions of this Court.

/s/ Stewart A. Newblatt
STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

*The Court has examined Petitioners' objections to the Magistrate Judge's Report and Recommendation, their supplement thereto and the Respondent's response. It is my belief that the

Respondent has accurately analyzed the objections and adequately stated the reasons the Court should and does reject the objections.

JUDGMENT
ENTERED: April 6, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

CARNELL AND DARNELL BATES,

Petitioners

vs.

CIVIL NO.: 90-CV-40256-FL
HON. Stewart A. Newblatt
HON. Marc L. Goldman

PAMELA WITHROW,

Respondent
_____/

JUDGMENT

The Court has reviewed the file, the Magistrate's Report and Recommendation, and any timely objections filed thereto.

Now, therefore, IT IS ORDERED AND ADJUDGED that the Petitioners' application for writ of habeas corpus is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the Clerk serve a copy of this Judgment by United States mail on the counsel for Plaintiff and on the counsel for Defendant.

/s/ Stewart A. Newblatt
STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

Date: /s/ 3/31/92
Flint, Michigan

OPINION AND JUDGMENT OF MICHIGAN COURT OF APPEALS
FILED: DECEMBER 27, 1989

PEOPLE OF THE STATE OF MICHIGAN, DEC 27 1989

Plaintiff-Appellee

v No. 110 628

DARNELL BATES & CARNELL BATES,

Defendant-Appellant. (sic)

Before: Wahls, P.J., and Gribbs and Shepherd, JJ.

PER CURIAM.

On September 12, 1985, defendants were convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and felony firearm, MCL 750.227b; MSA 28.424(2). They were each sentenced to a life term of imprisonment and to a two-year term for felony firearm. Defendants filed claims of appeal in June 1986, and a panel of this Court affirmed their convictions and sentences in an unpublished per curiam opinion. People v Bates, ## 93151, 93152, rel'd 4/17/87. Defendants application for leave to appeal was denied by the Michigan Supreme Court.

On March 12, 1988, defendants filed a motion for leave to file a delayed motion for new trial and an evidentiary hearing. Defendants raised, for the first time, the claim at issue here. Defendants appeal by leave granted. We affirm.

Defendants argue on appeal that they were deprived of effective assistance of counsel when their trial counsel failed to advise them of a plea bargain offer. Following an evidentiary hearing on this matter, the trial court concluded that counsel was not ineffective in this case. Both defendants and their father testified that they learned of the plea bargain offer immediately after the verdict in this case. Trial counsel, defendants' uncle, testified that he did not recall whether or not he informed defendants of the plea offer. The trial court found that defendants knew about the plea bargain at the time of the verdict and that they and their counsel had, in fact, manufactured this issue as an "appellate parachute".

At least one panel of this Court has ruled that an attorney's failure to advise his client

of a plea bargain offer may be ineffective assistance of counsel. People v Williams, 171 Mich App 234, 429 NW2d 649 (1988), remanded for further proceedings, 432 Mich 853 (1989). However, where, as here, determination of an issue hinges entirely on the credibility of witnesses, this Court will not substitute our judgment for that of the trier of fact. MCR 2.613(C). We give special deference to the trial court's findings when they are based on the credibility of witnesses. In re Fritz Estate, 159 Mich App 69, 76; 406 NW2d 475 (1987).

In any event, as there is no claim that the alleged error in this case contributed in any way to the verdict, we believe any error was harmless. See Satterwaite v Texas, ___US___; 108 S Ct 1792, 1797; 100 L Ed 2d 284 (1988). Inadequate assistance or a major mistake by an otherwise competent lawyer does not justify reversal unless, but for counsel's mistake, defendant would have had a reasonably likely chance for acquittal. People v Perkins, 141 Mich App 186, 191; 366 NW2d 94 (1985), lv den 423

Mich 858 (1985); People v Caldwell, 122 Mich App 618, 624-625; 333 NW2d 105 (1983); People v McShan, 120 Mich App 496, 500; 327 NW2d 509 (1982), lv den 417 Mich 1060 (1983).

Moreover, a defendant has no absolute right to have his guilty plea accepted. People v Ott, 144 Mich App 76, 79-80; 372 NW2d 694 (1985). A defendant may only enter a plea of guilty with the court's consent. MCR 6.101(F) (now MCR 6.302). As the trial court noted in this case, there is no assurance here that the court would have accepted defendants' pleas. In addition, since defendants presented an alibi defense at trial and continued to maintain their innocence at the evidentiary hearing, a factual basis for a guilty plea could not have been established. MCR 6.101(F)(3)(a) (now MCR 6.302(D)(1)); Guilty Plea Cases, 395 Mich 96, 235 NW2d 132 (1975), cert den sub nom Sanders v Michigan, 429 US 1108, 97 S Ct 1142, 51 L Ed 2d 561 (1977).

The issue whether defendants are estopped from asserting their claim of ineffective assistance on appeal is irrelevant in light of

our decision to grant leave on this matter.

Affirmed.

/s/ Myron H. Wahls

/s/ Roman S. Gribbs

/s/ John H. Shepherd

ORDER OF MICHIGAN SUPREME COURT
DENYING LEAVE TO APPEAL
ENTERED: September 5, 1990

ORDER
Entered: September 5, 1990

MICHIGAN SUPREME COURT
Lansing, Michigan
Dorothy Constock Riley
Chief Justice

Charles L Levin
James H Brickle
Michael F Cavanagh
Patricia J Boyle
Dennis W Archer
Robert P Griffin
Associate Justices

88068

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appeellee

v

SC: 88068
COA: 110628
LC: 85-02957,85-01507

DARNELL BATES AND CARNELL BATES,

Defendant-Appellant (sic)

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin and Archer, JJ., would remand the case to the Recorder's Court for further fact-find

ing.

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[Seal] I, CORBIN R. DAVIS, Clerk of the Michi gan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/September 5,1990 /s/ Jacqueline B. MacKinnon
/s/ Deputy Clerk